

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suede G. Kelly.

Black Hills Ontario, L.L.C.

Docket Nos. EL04-30-000  
QF84-122-004

ORDER GRANTING APPLICATION FOR RECERTIFICATION AS A QUALIFYING  
COGENERATION FACILITY AND GRANTING LIMITED WAIVER OF  
OPERATING AND EFFICIENCY STANDARDS

(Issued February 17, 2004)

1. This order addresses two requests by Black Hills Ontario, L.L.C. (Black Hills or Applicant), one for the recertification of the cogeneration facility as a qualifying facility (QF) due to a change in upstream ownership and the other for a limited waiver of the Commission's efficiency standard<sup>1</sup> applicable to the cogeneration facility for calendar year 2003. Black Hills' request for a limited waiver of the efficiency standard is triggered by a reduction in production by its thermal host, resulting in reduced use of Applicant's steam. Applicant states that it expects to be unable to satisfy the efficiency standard required by Section 292.205(a)(2) of the Commission's regulations during calendar year 2003. Applicant states that it expects to be in compliance with the Commission's regulations for calendar year 2004. As discussed below, the Commission

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<sup>1</sup> The operating and efficiency standards are contained in Section 292.205 of the Commission's regulations. See 18 C.F.R. § 292.205 (2003). For any qualifying topping-cycle cogeneration facility, the operating standard requires that the useful thermal energy output of the facility (*i.e.*, the thermal energy made available to the host) must, during the applicable period, be no less than five percent of the total energy output. The Commission's operating standard ensures that the facility's thermal host meets a certain threshold level of heat utilization. See Everett Energy Corp., 45 FERC ¶ 61,314 (1988).

Section 292.205(a)(2) of the Commission's regulations establishes an efficiency standard for topping-cycle cogeneration facilities for which any of the energy input is natural gas or oil. The useful power output of the facility plus one-half the useful thermal energy output during the applicable period must be no less than 42.5 percent of the total energy input of natural gas or oil. If the useful thermal energy output is less than 15 percent of the total energy output of the facility, the useful power output of the facility plus one-half of the useful energy output must be no less than 45 percent, rather than 42.5 percent. 18 C.F.R. § 292.205(a)(2) (2003). The Commission's efficiency standard ensures that the facility operates at or above a certain level of performance when it uses natural gas or oil.

will grant Black Hill's request for: (1) recertification as a QF, and (2) waiver of the efficiency standard for calendar year 2003.

## **Background**

### **Factual Background**

2. The 7.84 MW natural gas-fired topping cycle cogeneration facility (Facility) is located in Ontario, California. The facility consists of two Cheng Cycle Series 7 cogeneration systems, each based on Allison 501-KH gas turbine generators and a heat recovery steam generator.<sup>2</sup> Black Hills sells the electric output of the facility to Southern California Edison Company (So. Cal. Edison). Black Hills sells the thermal output of the facility to Sunkist Growers, Inc. (Sunkist). Sunkist uses the thermal output to process citrus fruit into consumer products.

### **Request for Recertification and Waiver**

3. On November 26, 2003, Black Hills filed an application seeking Commission recertification of its Cogeneration Facility as a QF due to changes in ownership, and seeking waiver of the Commission's efficiency standard for calendar year 2003.

4. Applicant states that on September 30, 2003 Hamptons Power II, LLC (Hamptons II) acquired its membership interests in Black Hills from Hamptons Power LLC (Hamptons). According to the application, Hamptons II and Hamptons are owned by the same non-utility owner. Hamptons transferred its 50 percent membership interests in the Applicant as part of an unrelated restructuring. Applicant states that Hamptons II is not an electric utility or an electric utility holding company and is not an affiliate or subsidiary of an electric utility or electric utility holding company. The remaining 50 percent ownership interest of the Facility is maintained by Black Hills Generation, Inc. and North American Funding, LLC (NAF). Black Hills Generation, Inc. and NAF are both indirect subsidiaries of Black Hills Corporation, an exempt utility holding company, and are affiliated with Black Hills Power, Inc., a Black Hills Corporation subsidiary that is an electric utility.

5. Black Hills also requests that the Commission waive the efficiency standard for calendar year 2003. Black Hills states that during 2000, 2001, and 2002, high energy prices and economic volatility resulting from the California energy crisis caused Sunkist to curtail production at its Sunkist plant. As a result, Sunkist curtailed its use of the Facility's thermal energy, and the Facility was unable to meet the Commission's QF efficiency standard during the period 2000 through 2003. Because the Commission

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<sup>2</sup> The facility was certified as a QF in 1984. International Power Technology, 27 FERC ¶ 62,001 (1984). Notices of self-certification were filed on August 19, 1997; June 21, 2001; and June 30, 2002.

granted a blanket waiver of the QF efficiency standard for facilities located in the Western Systems Coordinating Council for the years 2000, 2001, and 2002, Black Hills was able to maintain its QF status during this period.<sup>3</sup>

6. Black Hills states, however, that it expects Sunkist's production to rebound significantly. Sunkist's production in 2003 started out far below historical norms but then increased steadily throughout the year as Sunkist transferred production back to the Ontario facility.

### **Notice, Interventions and Protests**

7. Notice of the Applicant's filing was published in the Federal Register, 68 Fed. Reg. 68,889 (2003), with comments, protests, and interventions due on or before December 26, 2003. On December 26, 2003, So. Cal. Edison filed a motion to intervene and protest. So. Cal. Edison argues that because Black Hills' petition is not timely because it waited to file its petition until November of the year for which it seeks the waiver. So. Cal. Edison asserts that Black Hills is not entitled to a waiver because it has known for more than a year of its inability to comply with the Commission's efficiency standard and did not take appropriate steps to achieve compliance. So. Cal Edison states that Black Hills' acknowledgement of Sunkist's decreasing operations and steam requirements during 2000-2002 demonstrates that Black Hills was aware that it might not meet efficiency standards for a lengthy period. So. Cal. Edison also asserts that Black Hills has not sufficiently demonstrated that further waivers are not likely to be required

8. On January 7, 2004, Black Hills filed an answer. Black Hills argues that no useful purpose would be served by finding that Black Hills should have filed its waiver petition earlier in the year. Black Hills asserts that filing a waiver petition earlier in the year, when it seemed reasonable for Black Hills to believe that no waiver would be needed, would have posed the risk that Black Hills would waste the Commission's time and resources due to an unnecessary waiver petition, and wasted Black Hills' own resources as well. Black Hills also argues that it has provided a reasonable basis for the

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<sup>3</sup> San Diego Gas & Electric Co., et al., 93 FERC ¶ 61,238 (2000) (granting initial blanket waiver of the QF operating and efficiency standard through January 1, 2001); San Diego Gas & Electric Co., et al., 93 FERC ¶ 61,294 (2000) (extending effectiveness of blanket QF waivers through April 30, 2001); Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States and Requesting Comments on Further Actions to Increase Energy Supply and Decrease Energy Consumption, 94 FERC ¶ 61,272 (2001) (extending effectiveness of blanket QF waivers through December 31, 2001); Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States, 95 FERC ¶ 61,225 (2001) (extending effectiveness of blanket QF waivers through April 20, 2002); San Diego Gas & Electric Co., et al., 97 FERC ¶ 61,275 (2001) (extending effectiveness of blanket QF waivers through December 31, 2002).

Commission to conclude that Black Hills will likely not need additional efficiency standard waivers in future years to maintain QF status. Specifically, Black Hills points to its discussion of Sunkist's use of thermal energy from the Facility in the final quarter of 2003 and assurances from Sunkist that such use will be maintained as providing such a basis.

## **Discussion**

### **Procedural Matters**

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.213(a)(2) (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Black Hills' answer because it has provided information that assisted us in our decision-making process.

### **Application for Recertification**

10. The only change from the last Commission certification of Black Hill's Facility relates to the ownership of the facility. Under Section 292.206, no more than 50 percent of the equity interest in a QF may be held, directly or indirectly through subsidiaries, by electric utilities and/or electric utility holding companies (i.e., electric utility entities).

11. According to Applicant, neither Hamptons II nor any of its upstream owners or subsidiaries is or will be engaged in the generation or sale of electric power, or will have any ownership or operating interest in any electric facilities other than possible ownership interests in qualifying facilities, exempt wholesale generators (EWGs)<sup>4</sup> or foreign utilities.<sup>5</sup>

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<sup>4</sup> An EWG is not considered an electric utility company under Section 2(a)(3) of the Public Utility Holding Company Act of 1935 (PUCHA), as amended by the Energy Policy Act of 1992, and ownership of an EWG does not result in an entity being considered to be primarily engaged in the generation or sale of electric power under Sections 3(17)(C)(ii) and 3(18)(B)(ii) of the Federal Power Act (FPA). See Sections 32(c) and 32(j) of PUCHA.

<sup>5</sup> Ownership of foreign electric facilities has no effect on whether the facility satisfies the Commission's ownership criteria. See General Electric Capital Corporation, 70 FERC ¶ 61,141 (1995).

12. Since no more than 50 percent of the Facility is owned by an electric utility, the Facility satisfies the Commission's QF ownership criteria. Accordingly, we recertify the Facility as a QF.

### **Request for Waiver**

13. The Commission's regulations (see supra note 1) provide that a qualifying facility must satisfy applicable operating and efficiency requirements "during any calendar year period." Section 292.205(c) of the Commission's regulations provides that the Commission may waive any of its operating and efficiency standards "upon a showing that the facility will produce significant energy savings."<sup>6</sup> The Commission has exercised its waiver authority in a number of cases based on factors such as the limited duration of the requested waiver; whether non-compliance was confined to the start-up and testing stage, and whether further waivers would therefore be unnecessary; the timeliness of the request; whether the request was intended to remedy specific problems associated with an innovative technology; the amount of opposition, if any; and whether granting waiver would fulfill PURPA's goal of encouraging cogeneration and the development of alternative generation technologies.<sup>7</sup>

14. Balancing the relevant factors, we will grant Black Hills' request for waiver. The need for waiver is the result of events outside of Black Hills' control, i.e., enduring economic volatility arising from the California energy crisis and the resulting reduction in production by its thermal host. Although So. Cal. Edison argues that the request for waiver is not timely, we find that Black Hills' request was timely because Black Hills sought waiver as soon as it became reasonable to conclude that Black Hills would fail to comply with the efficiency standard for 2003. While Black Hills failed to meet the Commission's efficiency standards for calendar year 2003, the many years during which it has, and intends to again, operate in compliance with those standards will result in considerable energy savings.<sup>8</sup> A grant of limited waiver is thus consistent with the

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<sup>6</sup> 18 C.F.R. § 292.205(c) (2003); see also City of Fremont v. FERC, 336 F.3d 910, 916-917 (9<sup>th</sup> Cir. 2003).

<sup>7</sup> See, e.g., Oildale Energy LLC, 103 FERC ¶ 61,060 (2003); Kamine/Besicorp Allegany L.P., 73 FERC ¶ 61,290 at 61,808-09 (1995), reh'g denied, 74 FERC ¶ 61,094 (1996); Gordonsville Energy, L.P. 72 FERC ¶ 61,160 at 61,790-91 & n.7 (1995), and the cases cited therein.

<sup>8</sup> We find that Black Hills' discussion of its thermal host's use of the Facility's energy during the last four months of 2003 and prospective use in 2004 to be sufficient to demonstrate that further waivers are not needed. Moreover, we note that Black Hills has always been in compliance with the Commission's operating standards and that its failure to satisfy the efficiency standard during calendar year 2003 was by a small amount. The efficiency standard for the Facility was 42.5%, while Black Hills achieved an efficiency value of 42.0%.

PURPA goal of encouraging cogeneration and alternative generation technologies. Accordingly, we will grant waiver for a limited period of time, for calendar year 2003, in order to give Black Hills the opportunity to recover from the circumstances which have led to its failure to meet the efficiency standard.

The Commission orders:

(A) The application for recertification of qualifying facility status filed on November 26, 2003, by Black Hills pursuant to 18 C.F.R. § 292.207(b) (2003), and Section 3(18)(B) of the Federal Power Act, as amended by Section 201 of the Public Utility Regulatory Policies Act, 16 U.S.C. § 796(18)(B) (1994), is hereby granted, provided that the facility is owned and operated in the manner described in the application and this order.<sup>9</sup>

(B) Black Hills' request for temporary waiver of the efficiency standard, 18 C.F.R. § 292.205 (2003), is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.

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<sup>9</sup> Certification as a qualifying facility serves only to establish eligibility for the benefits provided by the Public Utility Regulatory Policies Act of 1978, as implemented by the Commission's regulations, 18 C.F.R. Part 292. It does not relieve a facility of any other requirements of local, state or Federal law, including those regarding siting, construction, operation, licensing and pollution abatement. Certification does not establish any property rights, resolve competing claims for a site, or authorize construction.